

IN THE MISSOURI SUPREME COURT

No. SC 95482

Karen Carpenter,

Appellant,

vs.

State Board of Nursing,

Respondent.

**Appeal from the Circuit Court of the City of St. Louis, Missouri
The Honorable David Dowd, Circuit Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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Statement of Facts

On May 5, 2011, the Missouri State Board of Nursing filed a complaint with the Administrative Hearing Commission asking for a decision finding cause existed to discipline Karen Carpenter's license as a registered professional nurse. (L.F. 94-97). The complaint asserted that on April 25, 2008, Carpenter asked co-workers for "pain killers" while she was on duty at Fulton State Hospital, that she was subsequently asked to submit to a urine drug screen and tested positive for Propoxyphene and Oxazepam, and that she did not have a valid prescription for either substance. (L.F. 94-97). On September 13, 2012, the Administrative Hearing Commission issued its decision finding Carpenter subject to discipline because she unlawfully possessed controlled substances, for which she tested positive, while on duty as a nurse. (L.F. 101-106). In addition, the Administrative Hearing Commission found Carpenter's actions constituted misconduct, gross negligence, and a violation of professional trust. (L.F. 101-106).

The Missouri State Board of Nursing then conducted its hearing to determine what discipline, if any, to impose on Carpenter's license. (L.F. 29)¹.

¹ This legal file citation is to a copy of the Board's order that is attached as an exhibit to Carpenter's circuit court judicial review petition. Carpenter did not

On December 17, 2012, the Board in its adjudicative capacity issued an order placing Carpenter's license on probation for three years, subject to specified terms and conditions. (L.F. 29-39).

On January 15, 2013, Carpenter through counsel filed a petition for judicial review in the Circuit Court of St. Louis City. (L.F. 8). The petition asserted that the Administrative Hearing Commission did not have authority to issue its decision because the Board's complaint was filed in violation of the statute of limitations imposed by §324.043.1, RSMo, and that the Board's disciplinary decision was unreasonable, arbitrary, capricious and an abuse of discretion. (L.F. 8-15). On February 20, 2014, the circuit court issued "Partial Judgment" denying Carpenter's statute of limitations claim. (L.F. 162-168). On September 26, 2014, the circuit court reversed the Board's disciplinary order finding that the length and terms of probation were arbitrary and capricious. (L.F. 211-223).

On October 24, 2014, Carpenter filed a motion asking the court to enter final judgment or amend its judgment, and also filed an application for attorney fees pursuant to §536.087, RSMo 2000. (L.F. 224-270). On February 10, 2015, the circuit court issued its "Final Judgment" finding the length and

include a separate certified copy of the Board's order in the legal file, but Respondent accepts the authenticity of the copy attached to the petition.

terms of probation were arbitrary and capricious, and modifying the Board's order by reducing the period of probation to one year and eliminating the majority of the terms of probation (including employment requirements, employment restrictions, chemical dependency treatment and rehabilitation, and drug screens). (L.F. 33-39, 377-394). In addition, the judgment denied Carpenter's application for attorney fees. (L.F. 392-394). The court found that Carpenter was not a prevailing party in that Carpenter did not prevail on the significant issue in the case, whether Carpenter's license was subject to discipline. (L.F. 392-394).

Carpenter appeals the circuit court's denial of her application for attorney fees. (L.F. 397-420).

Standard of Review

Pursuant to §536.087(7), RSMo 2000, this Court's review shall be based solely on the record made before the court below. The trial court's disposition shall be affirmed unless it was arbitrary and capricious, was unreasonable, was unsupported by competent and substantial evidence, or made contrary to law or in excess of the court's jurisdiction. *Garland v. Ruhl*, 455 S.W.3d 442, 446 (Mo. 2015).

The trial court's judgment shall be affirmed under any reasonable theory supported by the evidence, even if the theory advanced by the trial court is wrong or insufficient. *Rouner v. Wise*, 446 S.W.3d 242, 249 (Mo. 2014).

Argument

I.

A licensee found subject to discipline does not become a prevailing party if the discipline imposed is reduced on judicial review.

This case presents the following question: when a licensing board as a litigant successfully obtains authority to discipline a professional's license, does §536.087 subject that board to fees if the disciplinary order the Board imposes as an adjudicator is reduced upon judicial review? The answer is no.

This matter began by the Board filing a complaint with the Administrative Hearing Commission seeking authority to discipline Carpenter's license. The Board advocated and the Administrative Hearing Commission found that Carpenter possessed controlled substances, committed misconduct and gross negligence, and violated professional trust. The Board successfully established the factual basis and each legal basis for discipline asserted in its complaint, prevailing in all aspects of its position.

Having prevailed in its position, the Board's role changed from an advocate to an adjudicator. Professional licensure disciplinary proceedings are bifurcated. First, the Administrative Hearing Commission determines that cause to discipline a licensee exists. If the Board prevails in establishing cause to discipline, the Administrative Hearing Commission then forwards the record to the Board, and the Board conducts a hearing regarding the appropriate disciplinary sanction. Section 621.110.1, RSMo Cum. Supp. 2013. At this stage the Board does not assert a position, but receives evidence from the licensee or other sources and determines the discipline to be imposed:

The agency may receive evidence relevant to said issue from the licensee or any other source. After such hearing the agency may order any disciplinary measure it deems appropriate and which is authorized by law.

Section 621.110.1.

After hearing the evidence presented by Carpenter in the disciplinary hearing, the Board placed Carpenter's license under three years' probation. Subsequently, Carpenter filed an action for judicial review, which resulted in the circuit court affirming the Administrative Hearing Commission's merits decision, but reducing the discipline imposed by the Board to one year of probation. Based on this reduction in discipline, Carpenter asserts she is the prevailing party in this matter, that the Board order has been established as unreasonable, and that she is therefore due an award of fees.

Carpenter misconstrues §536.087. Section 536.087.1 allows a party that prevails against the state in an agency proceeding or civil action or arising therefrom to collect fees so long as the state's **position** is not substantially justified. However, the Board's disciplinary decision does not constitute a "position" as that term is used in §536.087. *See Garland v. Ruhl*, 455 S.W.3d 442, 447 (Mo. 2015).

In *Garland*, this court held that pursuant to §536.087.1, the state has only waived sovereign immunity where each of four elements exist: 1) the fee applicant and the state agency were adversarial parties in an "agency proceeding" brought by or against the state; 2) the state agency asserted an erroneous position in that "agency proceeding"; 3) the fee applicant prevailed against the agency's position, either in the agency proceeding or in a civil

action arising from it; and 4) the state agency fails to show its position was substantially justified. *Id.* at 450. In examining the second element, this Court stated that “a decision by and administrative official acting as an adjudicator in a contested case is not the same as—and cannot constitute—a **position** asserted ‘during such agency proceeding’ by an attorney representing the state.” *Id.* at 448.

Even if one argued that Carpenter “prevailed” at the circuit court when it reduced her discipline, Carpenter did not prevail in the manner necessary under the *Garland* test. In *Garland*, this court ruled that §536.087 only applies if a private party prevails against a position taken by the state as a party in an agency proceeding. *Garland* 455 S.W.3d at 448. In other words, a private party may “prevail” at the circuit court level, but it must be on an issue related to the position advocated by the state at the agency level. The circuit court decision did not in any way find error in the **position** advocated by the Board at the agency level. Carpenter cannot be said to have prevailed “against the agency’s position.” The discipline imposed was an adjudicative decision, not a position of the state. If the Board in this matter had imposed one year of probation as the original discipline, Carpenter would not have a claim that she prevailed in any respect. Has she now prevailed because that discipline was imposed on judicial review, instead of originally? Section 536.087 does not extend to all actions by a state agency, but is aimed by its

language to provide relief to a private party that is forced unnecessarily to engage in an agency contested-case hearing due to an unjustified litigation position taken by a state agency. (It does not provide relief when a private party is forced to take action or defend itself in first instance at the circuit court.) Carpenter was not subject to an unnecessary agency contested-case hearing. Carpenter unlawfully possessed controlled substances, and such actions are a proper basis for discipline. The purpose of §536.087 is not served by awarding Carpenter fees.

Carpenter asserts that she is entitled to fees because there was a “material alteration of the legal relationships of the parties” when her discipline was reduced by the circuit court. Carpenter ignores that the process began at the administrative level with her having an unencumbered license, and ended with her possessing a probated license. The material alteration that occurred is that her license is no longer unencumbered, but under discipline. Carpenter may have had the consequences of her unlawful conduct reduced, but she did not prevail.

The Board sought and was granted cause to discipline Carpenter, and such cause was affirmed by the circuit court. The Board achieved the authority sought in its complaint. In *White v. Missouri Veterinary Medical Bd.*, 906 S.W.2d 753 (Mo.App. W.D. 1995), the Court of Appeals ruled that the significant issue in a professional discipline matter is whether the

professional's license is subject to discipline, and that the policies sought to be furthered by §536.087 are not served by granting fees to a licensee who is sanctioned as a result of the underlying litigation. *Id.* at 756-757. In *White*, the Veterinary Board filed a complaint containing multiple alleged factual bases for discipline. White successfully defended against several of the allegations, but cause was found to discipline White. The court ruled that White could not be considered a prevailing party, because the state prevailed on the significant issue of the underlying litigation, and the legal relationship of the parties was altered in the matter sought by the Board and opposed by White. *Id.* at 756. Likewise, in this matter the Board sought and was granted cause to discipline Carpenter's license, altering the legal relationship between the Board and Carpenter in the matter sought by the Board and opposed by Carpenter.

Carpenter relies on *Sanders v. Hatcher*, 341 S.W.3d 762 (Mo.App. W.D. 2011), and *State of Mo., Div. of Child Support Enforcement v. Grimes*, 998 S.W.2d 807 (Mo. App. E.D. 1999) to support its position. Such reliance is inapposite. Most importantly, *Sanders* and *Grimes* are contrary to this Court's subsequent *Garland* decision. Each involved an administrative child support order like that addressed in *Garland*, and deemed by this Court to be a decision rather than a position. *See Sanders*, 341 S.W.3d at 763, and *Grimes*, 998 S.W.2d at 808. Further, *Sanders* involved a plaintiff that

obtained relief on one of the claims presented in his underlying administrative challenge, not a defendant who was found subject to discipline, and then failed in her challenge to that finding but had the discipline imposed for her prohibited conduct reduced. *Grimes* involved an even more peculiar scenario. In that case, Grimes filed an original action in circuit court alleging in part that an administrative child support order that had two years earlier been certified to the circuit court was the product of mistake and fraud. *Grimes*, 998 S.W. 2d at 808. There is no meaningful parallel between *Grimes* and this matter.

Lastly, even if Carpenter were entitled to claim prevailing party status by separating the “favorable judgment” achieved at circuit court from the unfavorable result that she no longer possesses an unencumbered license, Carpenter would not be entitled to the relief she seeks. Carpenter would not be entitled to remand for an award of fees unless there was first a determination that the state was not substantially justified. Carpenter would not be entitled to a finding that the state was not substantially justified in the circuit court proceeding just because the agency’s disciplinary order was reduced pursuant to the statutory scope of review. First, a favorable order does not create a presumption that the state’s position was unjustified. Section 536.087.3. Second, the question would not be the propriety of the order itself, but rather the reasonableness of the agency’s

basis for defending that the order was not an abuse of discretion or arbitrary and capricious. Should the state have not defended the order in light of the significant discretion afforded professional boards in imposing appropriate discipline as acknowledged in Carpenters brief? Appellant's brief at 45. That is a determination that has not yet been made.

II.

Carpenter could not be awarded fees under §536.087, RSMo, because Carpenter failed to plead and establish that she was a “party” as defined in §536.085(2), RSMo, in that Carpenter neither pleaded nor established her net worth.

Carpenter is not entitled to attorney fees under §536.087 because Carpenter neither alleged in her application nor proved that her net worth did not exceed two million dollars at the time the case was initiated. Pursuant to §536.087.3, an application for fees must show “that the party is a prevailing party and is eligible to receive an award.” Section 536.085 (2), RSMo 2000 limits who is eligible for an award by defining “party” so as to exclude individuals whose net worth exceeds two million dollars. An applicant for fees, therefore, must allege and prove that the applicant’s net worth did not exceed the statutory figure. *Melahn v. Otto*, 836 S.W.2d 525, 528 (Mo. App. W.D 1992. Carpenter’s application and supporting affidavits are devoid of any reference to her net worth. (L.F. 259-333).

Conclusion

For the foregoing reasons the circuit court's judgment denying Carpenter attorney fees pursuant to §536.087 should be affirmed.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing was filed electronically pursuant to Rule 103 through Missouri Case Net, on this 7th day of April, 2016, to:

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Certification of Compliance

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 2,762 words.

/s/ Daryl R. Hylton
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